No. 15 Miscellaneous

In the Supreme Court of the United States

OCTOBER TERM, 1951

FAR EAST CONFERENCE ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

FEDERAL MARITIME BOARD, INTERVENOR-RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR RESPONDENT FEDERAL MARITIME BOARD

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OPINION BELOW

The opinion of the District Court is reported at 94 F. Supp. 900.

JURISDICTION

This Court issued the writ of certiorari pursuant to Section 1651 (a) of Title 28, U. S. Code; *United States Alkali Export Assn.* v. *United States*, 325 U. S. 196; and *DeBeers Consolidated Mines* v. *United States*, 325 U. S. 212.

STATUTES INVOLVED

Sections 1, 2 and 4 of the Sherman Act (15 U. S. C. 1, 2, 4); sections 14, 15 and 22 of the Shipping Act (46 U. S. C. 812, 814, 821). These statutes are set forth in Appendix A.

QUESTIONS PRESENTED

Petitioning steamship carriers in 1922 organized themselves into a conference by means of an agreement approved by Federal Maritime Board [1] under section 15 of the Shipping Act, 1916 (46 U. S. C. 814). The conference published a tariff containing two levels of freight rates, the lower rates being available only to shippers who agree to patronize member lines of the conference exclusively. The United States, through the Antitrust Division of the Department of Justice, sued in 1948 to enjoin such dual rate system under section 4 of the Sherman Act (15 U. S. C. 4). The Board, as the agency responsible under the Shipping Act for administration of the steamship conference system, intervened as a defendant under Rule 24 of the Federal Rules of Civil Procedure (R., 94). The Board and the defendant lines (petitioners here) moved to dismiss the complaint (R., 72–76, 95). The District Court

[1] Federal Maritime Board, established by Reorganization Plan 21 of 1950 (15 F. R. 3178) administers the Shipping Act, 1916, as successor to the Shipping Board, the Shipping Board Bureau of the Department of Commerce and the United States Maritime Commission. Each of these establishments is referred to herein as the Board.

denied the motions (R., 104–5)—as it also denied a motion by the Government for judgment on the pleadings. The Government did not seek review of the District Court's order insofar as it denied the latter motion. The writ of certiorari brings the order here for review only insofar as it denied the motion to dismiss the complaint.

The case presents the following questions:

(a) Did the District Court have jurisdiction of the suit in the absence of prior resort by the Attorney General to a proceeding before the Board?

(b) If the District Court had jurisdiction, did it abuse its discretion in exercising such jurisdiction by refusing to dismiss the complaint?

(c) Does the complaint state a cause of action for injunctive relief under section 4 of the Sherman Act in the absence of an allegation that relief was first sought in a proceeding before the Board?

STATEMENT

The Board's motion to dismiss the complaint (R., 95) was made on the grounds that (a) the District Court lacked jurisdiction over the subject matter of the action and (b) the complaint failed to state a claim upon which relief could be granted. These were substantially the same grounds as those on which the motions of the conference and its member lines were founded. Its intervention and motion were based on the contention that the complaint related to matters com-

mitted by law to the Board's exclusive preliminary jurisdiction—the Board having approved the defendants' conference agreement under section 15 of the Shipping Act (46 U. S. C. 814), thereby exempting it from the antitrust laws. The Board did not file a petition for certiorari to review the order of the District Court denying its motion to dismiss; but it was named as respondent in, and gave its suport to, a petition of the Far East Conference and its members for leave to file such a writ. That petition was granted and a writ issued accordingly (R., 105).

The Board contends that if the present suit should be allowed, the Board's chief regulatory function—i. e., administration of steamship conference system—would be effectively transferred from the Board to the Attorney General, and that this result would involve "a frustration of the functions which Congress has directed the [Board] to perform and of the policy which Congress presumably sought to effectuate by their performance." *United States Alkali Export Assn.* v. *United States*, 325 U. S. 196, 204.

The motions to dismiss the complaint relied chiefly upon *United States Navigation Co.* v. *Cunard S. S. Co., Ltd.*, 284 U. S. 474, in which a private plaintiff sued under Section 16 of the Clayton Act (15 U. S. C. 26) for an injunction to restrain a combination of steamship lines from using a dual-rate, exclusive patronage system of ocean freight rates, of the type described in the

instant complaint. The case differed from the present suit only in that (1) the plaintiff was a private shipping company rather than the Government of the United States; and (2) it did not appear in *United States Navigation*, as it *does* appear here, that the defendant steamship lines acted pursuant to an approved conference agreement.[2]

This Court dismissed the *United States Navigation* complaint because it related to matters *"within the exclusive preliminary jurisdiction of the Shipping Board,"* a predecessor of the Federal Maritime Board, and because the plaintiff's remedy was that afforded by the Shipping Act, *"which to that extent supersedes the antitrust laws."* (284 U. S. at 485).[3]

The Board's motion to dismiss the present complaint *on jurisdictional grounds* was based upon the explicit ruling in *United States Navigation* that the subject matter of such a suit as this fell within the Board's exclusive preliminary jurisdiction (284 U. S. at 485).

The motion to dismiss *for failure of the complaint to state a cause of action* was based on the equally explicit ruling in *United States Navigation* that with respect to such facts as those here (and

[2] Conference agreements are legalized and exempted from the antitrust laws, by section 15 of the Shipping Act, 1916 (46 U. S. C. 814), when approved by the Board.

[3] Emphasis is ours, here and in other quotations, except as specifically noted.

there) involved, the Shipping Act *supersedes* the Sherman Act.

The District Court held that it nevertheless had jurisdiction of the complaint because (1) the mere fact of governmental regulation does not wholly exempt a regulated industry from the Sherman Act; and (2) the exemption conferred upon the shipping industry by the Shipping Act may not be construed as a restriction upon the jurisdiction of the District Court.

The District Court declined to rule that the complaint fails to state a cause of action, because (1) the filing by the Government of a complaint for injunctive relief against violations of the Sherman Act is explicitly authorized by Section 4 of that Act (15 U. S. C. 4); (2) the Government's right to sue under Section 4 of the Sherman Act could not have been superseded by any remedy under the Shipping Act because under Section 22 of that Act (46 U. S. C. 821), the Government is not a "person" entitled to maintain a remedial proceeding before the Board to restrain Shipping Act violations; and (3) although the conference agreement may be within the antitrust exemption conferred by the Shipping Act, "it does not follow that all conduct of the defendants and the

[4] For a recent discussion of the distinction, in a related context, between want of jurisdiction in a court, and failure to state a claim on which relief can be granted, see *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246.

practices in which they may be concertedly engaged are exempt from the provisions of Section 1 of the Sherman Act."

SUMMARY OF ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE DISMISSED THE COMPLAINT ON AUTHORITY OF *UNITED STATES NAVIGATION CO.* v. *CUNARD S. S. CO., LTD.* 284 U. S. 474.

(A) ALTHOUGH *UNITED STATES NAVIGATION* WAS A SUIT INSTITUTED BY A PRIVATE PARTY, IT NEVERTHELESS REQUIRES DISMISSAL OF THE ATTORNEY GENERAL'S COMPLAINT IN THE PRESENT CASE

United States Navigation was a suit by a private litigant against a group of steamship lines, under section 16 of the Clayton Act, charging a combination and conspiracy among the defendant steamship lines, in violation of the Sherman Act, to exclude the plaintiff from an ocean trade route by means of the dual-rate, exclusive patronage system. This court held that the suit could not be maintained because the matters set forth in the complaint were within the exclusive primary jurisdiction of the Shipping Board. That decision controls the present case.

The court of appeals for the Second Circuit had stated in the same case that although the *United States Navigation* suit was not maintainable by a private party, it would have been maintainable by the Government. This court rejected that dictum, and left the question open.

United States Navigation is applicable here because the reasons for disallowing the suit under the Sherman Act all pertained to the nature of

the subject matter and had nothing to do with the plaintiff's status as a private litigant rather than an agency of the Government. This Court held that the facts presented a case for the exercise of expert judgment and administrative discretion by the Board as administrator of the Shipping Act, which Act was explicitly characterized as superseding the antitrust laws with respect to the acts charged against the defendants by the bill of complaint.

The District Court refused to dismiss the present complaint on the basis of the Board's exclusive preliminary jurisdiction, for the reason that section 4 of the Sherman Act explicitly confers upon the District Courts jurisdiction to grant injunctive relief against antitrust violations at the Government's suit. Section 16 of the Clayton Act conferred similar authority with respect to suits by private parties, upon the District Court which passed upon the *United States Navigation* complaint, but this Court held that nevertheless the case was one for the Board rather than for the court. If the Board had primary standing to pass upon the facts in *United States Navigation*, it has the same standing here.

The Board contends that *United States Navigation* means that the District Court *wholly lacks* jurisdiction of the present cause until after the Board has acted. In any event, the case means no less than the *exercise* of jurisdiction constitutes an abuse of discretion until the case has

first been referred to and passed upon by the Board. *Smith* v. *Hoboken R. R. Co.*, 328 U. S. 123, 129, 133; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 428; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 266–267. See also *United States* v. *Railway Express Agency* (D. C., Del.) 89 F. Supp. 981; and compare *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341.

(B) DECISIONS OF THIS COURT PRIOR TO UNITED STATES NAVIGATION WOULD HAVE NECESSITATED DISMISSAL OF THE COMPLAINT IN THAT CASE EVEN IF THE SUIT HAD BEEN INSTITUTED BY THE ATTORNEY GENERAL, RATHER THAN BY A PRIVATE PARTY

The decisions of this Court antedating *United States Navigation* had uniformly prohibited the Attorney General, acting under the anti-trust laws and the criminal provisions of the Interstate Commerce Act, from encroaching upon the primary administrative jurisdiction of the Interstate Commerce Commission. *United States* v. *Pacific & Artic Railway & Navigation Co.*, 228 U. S. 87; *United States* v. *St. Louis Terminal*, 224 U. S. 383, and 236 U. S. 194; *Terminal Railroad Ass'n. of St. Louis* v. *United States*, 266 U. S. 17. These decisions explain the refusal of this Court in *United States Navigation* to accept the dictum of the Circuit Court of Appeals that an opposite result would have been warranted had the suit been instituted by the Government rather than by a private plaintiff.

(C) THE APPLICABILITY OF THE *UNITED STATES NAVIGATION* DOCTRINE TO A SUIT BY THE ATTORNEY GENERAL HAS NOT BEEN AFFECTED BY SUBSEQUENT DECISIONS OF THIS COURT

Cases subsequent to *United States Navigation* have not impaired the authority of that decision. *United States Alkali Export Assn.* v. *United States*, 325 U. S. 196, and *United States* v. *Borden Co.*, 308 U. S. 188, on which the Attorney General has hitherto relied, do not support his contention that the doctrine of exclusive primary jurisdiction in administrative bodies is inapplicable to the Government when it sues in court through the Attorney General. *Alkali* turned primarily upon the point that the Federal Trade Commission, which was claimed to have exclusive primary jurisdiction under the Webb-Pomerene Act, lacked power to afford a complete remedy for the wrongs charged against the defendants (in contrast to the Maritime Board's power to afford a complete remedy here). *Borden* was decided on the grounds that (1) nonexempt classes of persons sought to rely upon an exemption from the antitrust laws and (2) the defendants had failed to make the Secretary of Agriculture a party to a marketing agreement. (Further, the statute involved imposed no penalties that could be regarded as substitutes for those of the antitrust laws). Accordingly, this Court refused to hold that the defendants were exempt from the antitrust laws or that their conduct was within the Secretary's exclusive jurisdiction. In neither *Borden* nor *Alkali* did this court announce or suggest a rule

that the Government is excused from preliminary resort to its own administrative agencies in cases within their jurisdiction.

(D) THE DISTRICT COURT WAS IN ERROR IN HOLDING THAT THE GOVERNMENT WAS WITHOUT A REMEDY UNDER SECTION 22 OF THE SHIPPING ACT

The District Court held that the Attorney General could not be forced to pursue an administrative remedy before the Board, for the reason that no such remedy was available to him. This conclusion was founded on Section 22 of the Shipping Act, which confers the right to file a complaint before the Board upon "any person." The District Court held that the United States is not a person under Section 22.

There is no such general rule as that upon which the District Court relied. See *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 92–94; *Stanley* v. *Schwalby,* 147 U. S. 508, 517. The United States was held to be a person for the purpose of filing a complaint for reparation before the Interstate Commerce Commission under Section 9 of the Interstate Commerce Act (49 U. S. C. 9), in *United States* v. *Interstate Commerce Commission,* 337 U. S. 426. Further, Section 16 of the Clayton Act (15 U. S. C. 26) inferentially recognizes the United States as a person in providing that *no person except the United States* may sue thereunder for equitable relief against common carriers regulated by the Interstate Commerce Commission.

The Maritime Board has at least twice admitted the Attorney General to intervention in its own proceedings, thus recognizing him as a person under its own rules. Such administrative recognition is entitled to judicial respect.

To hold for the purposes of this case that the United States is not a person under Section 22 of the Shipping Act is unnecessary and, moreover, is improvident, since the ruling would needlessly curtail the rights of the Government in other situations, including its right to seek reparation under the Shipping Act against carriers subject to the Board's jurisdiction.

It is immaterial, however, whether the Attorney General is entitled as of right to be recognized as a person under the Shipping Act, since the matters here involved are the primary responsibility of the Board under the rule of *United States Navigation,* and the Board's policing powers under the Shipping Act are exercised in the right of the United States as fully as are the functions of the Attorney General. Accordingly, the fact that the Attorney General might not have a right to initiate Board proceedings does not mean that the United States has no such right—since, with respect to matters covered by the Shipping Act, the Board *is* the United States.

(E) THE CONFERENCE AGREEMENT OF THE FAR EAST CONFERENCE AUTHORIZES THE USE OF THE DUAL-RATE SYSTEM

The Attorney General claimed below that the present case is removed from the Shipping Act and subjected to the Sherman Act because the basic agreement of the Far East Conference, which the Board approved, does not authorize the use of the dual rate exclusive patronage system. While this fact, if it were a fact, would be immaterial under *United States Navigation*, the truth is that the system is authorized by the conference agreement, and therefore by the Board's order approving such agreement. The agreement provides generally that the conference may fix rates. The type of rates to be fixed is clearly a matter for regulation and control by the Board. By settled administrative practice, the Board has interpreted the agreement as authorizing dual rates, and in the circumstances of this case, its own interpretation of its own order is controlling. *United States* v. *Eaton*, 169 U. S. 331, 343; *American Telephone & Telegraph Co.* v. *United States*, 299, U. S. 232, 242; *National Labor Relations Board* v. *Virginia Electric Power Co.*, 314 U. S. 469, 479; *Byers Transportation Co.* v. *United States*, (D. C., W. D. Mo.) 48 F. Supp. 550, 553. If the Board's order did not in fact authorize the dual rate system, the Board could amend its order at any time, and any decision of this Court based upon the fact that the Board had not amended its order would be merely

an "idle gesture." *Georgia* v. *Pennsylvania R. R. Co.*, 324 U. S. 439, 461.

II. THE BOARD HAS POWER UNDER SECTION 14 THIRD AND SECTION 15 OF THE SHIPPING ACT TO APPROVE CONFERENCE AGREEMENTS PROVIDING FOR THE DUAL-RATE SYSTEM

The Attorney General contended before the District Court that the Board's order approving the conference agreement should not be construed as authorizing the dual rate system, since if the order purported to have such effect, it was in excess of the Board's authority under Sections 14 Third and 15 of the Shipping Act.

The Board had full authority to issue an order approving the dual-rate system. The argument in support of such authority is fully covered in the Board's brief in *Federal Maritime Board* v. *United States of America*, No. 135 on this Court's current docket. Since that case will be argued at the same time as the present case, we refer to the argument as set forth in that brief, without further elaboration here.

* * * * *

This case presents the problem of making "a workable allocation of business" between the courts and an administrative agency of the Government. *Civil Aeronautics Board* v. *Modern Air Transport*, 179 F. 2d 622, 625. Such allocation requires recognition that courts and administrative agencies "are to be deemed collaborative instrumentalities of justice" and that "the appro-

priate independence of each should be respected by the other." *United States* v. *Morgan*, 313 U. S. 409, 422; also 307 U. S. 183, 191. A workable allocation of business between the courts and the Board in the present case demands full recognition of the Board's unquestioned primary jurisdiction under the *United States Navigation* rule. The collaborative status of the courts and the Board will be fully preserved by allowing the Board to make the first inquiry and determination, saving to the courts the power to assure the Board's compliance with law through their power to review its orders. Only by recognition of the Board's primary jurisdiction can the courts assure that the overlapping provisions of the Shipping Act and the antitrust laws will be fairly applied, and that the maritime interests of the United States will be regulated and protected in the manner intended by Congress.

ARGUMENT

POINT I

THE DISRTICT COURT SHOULD HAVE DISMISSED THE COMPLAINT ON AUTHORITY OF *UNITED STATES NAVIGATION CO.* v. *CUNARD S. S. CO., LTD.*, 284 U. S. 474

(A) ALTHOUGH *UNITED STATES NAVIGATION* WAS A SUIT INSTITUTED BY A PRIVATE PARTY, IT NEVERTHELESS REQUIRES DISMISSAL OF THE ATTORNEY GENERAL'S COMPLAINT IN THE PRESENT CASE

The only difference between the present suit and *United States Navigation* which remotely tends to support the District Court's refusal to dismiss is that here the plaintiff is the United States, acting through the Attorney General under

section 4 of the Sherman Act, whereas there the plaintiff was a private party, suing under section 16 of the Clayton Act (15 U. S. C. 26.) The several questions in the present case thus blend into one composite question: *Whether the doctrine that normally requires preliminary resort to a regulatory agency in cases falling within its special competence, is applicable as against the Government of the United States acting through the Attorney General.* We contend that it is—while acknowledging that *United States Navigation* did not expressly settle the issue.

That case reached this Court via the Court of Appeals for the Second Circuit (*United States Navigation Co.* v. *Cunard S. S. Co., Ltd.*, 50 F. 2d 83) which, in rejecting the argument that a private suitor had a right to an injunction against the defendants' conduct said (p. 89):

> *Doubtless the government would have such a right,* but it does not follow that the right inheres in private persons.

The Supreme Court did not accept the conclusion that "the government would have such a right." It said (284 U. S. 474, 486):

> But a failure to file such an agreement with the board will not afford ground for an injunction under section 16 of the Clayton Act at the suit of private parties—*whatever, in that event, may be the rights of the government*—since the maintenance of such a suit, being predicated

upon a violation of the antitrust laws, a right which, as we have seen, does not here exist.

In rejecting the dictum of the Circuit Court of Appeals and expressly leaving the question open, the Supreme Court necessarily cast doubt upon the proposition that the government would have stood in a better position than a private plaintiff.

United States Navigation is therefore open to examination to determine whether the reasoning on which it rests would have supported a different rule had the Government, instead of United States Navigation Company, been the plaintiff. The reasons for the decision were:

(1) The inquiry "is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if it is left to the Commission" (284 U. S. at p. 482).

(2) The determination "is reached ordinarily on voluminous and conflicting evidence, for the appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts" (284 U. S. at p. 482).

(3) "The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision" (284 U. S. at p. 483).

(4) "Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal" (284 U. S. at p. 485).

(5) The remedy for the conditions alleged in the complaint "is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws" (284 U. S. at p. 485).

(6) "The matter is therefore within the exclusive preliminary jurisdiction of the Shipping Board" (284 U. S. at p. 485).

None of these reasons bears any relationship to the identity of the plaintiff or to the question whether the plaintiff represents a private interest or public authority. In the present case, as in *United States Navigation*, the question is equally "one of fact and of discretion in technical matters," no matter who brings the suit. Uniformity of decision can be secured only if the question is left to the Maritime Board, no matter who brings the suit. The determination requires

the same appreciation of and acquaintance with intricate facts of transportation, no matter who brings the suit. The knowledge found in "a body of experts" is equally requisite to the decision, no matter who brings the suit. The accomplishment of the Congressional purpose requires the same "comprehensive study of an expert body continuously employed in administrative supervision", no matter who brings the suit. The economic relations, the facts peculiar to the shipping business or its history, the competitive conditions in foreign trade, the technical facts and usages of the industry, are identical, no matter who brings the suit. We find no basis whatever to justify a ruling in this case different from the ruling in *United States Navigation*, based upon the circumstance that this suit was instituted by the Government, whereas the other was not.

One reason cited by the District Court for refusing to dismiss the complaint on authority of *United States Navigation*, was that Section 4 of the Sherman Act explicitly vests in the District Courts jurisdiction to prevent and restrain violations thereof, and further, imposes upon United States District Attorneys the duty to institute equity proceedings to prevent and restrain such violations. The Court said (94 F. Supp. at p. 902):

> The language of the statute is free from ambiguity and there can be no doubt as

> to either the right of the United States to maintain suits under the antitrust laws or the jurisdiction of this court to entertain them.

The Court's reasoning, while based upon an accurate reading of the statutory language, ignores the entire body of law dealing with exclusive primary jurisdiction of administrative agencies. While it is true that section 4 of the Sherman Act authorizes the United States to maintain suits in equity to restrain Sherman Act violations, it was no less true in *United States Navigation* that Section 16 of the Clayton Act, upon which that suit was founded, explicitly authorized "any person * * * to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws * * *." Nevertheless, this Court refused to allow the action, but held that the question in the first instance was exclusively for the Board, for the reasons above stated—one of which was that insofar as the Shipping Act covered the allegations of the complaint, it superseded the antitrust laws. Since the facts are essentially the same in both cases, it cannot be denied that if the antitrust laws were superseded in *United States Navigation*, they are superseded here—and the superseded provisions must include section 4 of the Sherman Act precisely as in *United States Navi-*

gation they included section 16 of the Clayton Act.

It has been true, we believe, of every case applying the rule of primary administrative jurisdiction since *Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, that the plaintiff proceeded under a statute purporting to authorize a suit *in court*. Nevertheless, this Court has engrafted an exception upon every such statutory authorization to the effect that where the question presented demands the exercise of administrative discretion in technical matters under the jurisdiction of an administrative agency, adjudication must be had by the agency before the courts can act.[5] This rule, as the *Texas & Pacific* decision, *supra*, indicates, was applied from the outset even in cases arising under the Interstate Commerce Act which provides (49 U. S. C. 22) that nothing contained in that Act should abridge or alter existing common law or statutory remedies, but that the provisions of the Act are in addition to such remedies. The Shipping Act, however, contains no counterpart of that provision, and therefore presents a stronger case than those under the Interstate Commerce Act, for insistence upon preliminary resort to the administrative body having jurisdiction. *United States Navigation*

[5] See cases cited in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 260; and in *Lichten* v. *Eastern Airlines* (2d Cir., 1951), 189 F. 2d 939, 946, note 21; and in annotation on the doctrine of primary administrative jurisdiction, 94 L. ed. 806.

Co. v. *Cunard S. S. Co., supra,* (284 U. S. at p. 485).

This Court in *Montana-Dakota Utilites Co.* v. *Northwestern Public Service Co., supra,* recently emphasized the need to distinguish, in cases involving the doctrine of primary administrative jurisdiction, between (1) lack of jurisdiction in a court, and (2) failure of a complaint to state a cause of action. Mr. Justice Jackson said (241 U. S. at 249):

> As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action. The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions. Petitioner asserted a cause of action under the Power Act. To determine whether that claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative. If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has. In the words of Mr. Justice Holmes, "* * * if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good

> or bad." *The Fair* v. *Kohler Die & S. Co.*, 228 U. S. 22, 25, 57 L. ed. 716, 717, 33 S. Ct. 410. See also *Hurn* v. *Oursler*, 289 U. S. 238, 240 77 L. ed. 1148, 1150, 53 S. Ct. 586. Even a patently frivolous complaint might be sufficient to confer power to make a final decision that it is of that nature, binding as *res judicata* on the parties.

The motion to dismiss the present complaint, as previously noted, was based on the grounds that (1) the District Court lacked jurisdiction *and* (2) the complaint failed to state a cause of action, both grounds being securely founded upon *United States Navigation*.

If *Montana-Dakota* suggests that exclusive primary jurisdiction in an agency does not denote an absence of such jurisdiction in a court,* it nevertheless leaves undisturbed the rule that the *exercise* of jurisdiction may involve abuse of discretion in particular circumstances. This proposition is perhaps implied by *United States Navigation*, and is explicitly established in others of this Court's decisions upholding the primary jurisdiction of administrative bodies. *Smith* v. *Hoboken R. R. Co.* 328 U. S. 123, 129, 133; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 428; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247,

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* In *Montana-Dakota*, *supra*, the motion before the Court was one to dismiss the complaint "for want of jurisdiction in that it failed to state a claim under federal law" (341 U. S. at p. 256).

266-267. See also *United States* v. *Railway Express Agency* (D. C., Del.), 89 F. Supp. 981; and compare *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341.

In the *El Dorado* decision, *supra*, this Court said (308 U. S. at p. 433):

> When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but, as in *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 57 L. ed. 1472, 33 S. Ct. 916, *supra*, the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner may have will be saved to it.

(B) DECISIONS OF THIS COURT PRIOR TO *UNITED STATES NAVIGATION* WOULD HAVE NECESSITATED DISMISSAL OF THE COMPLAINT IN THAT CASE EVEN IF THE SUIT HAD BEEN INSTITUTED BY THE ATTORNEY GENERAL, RATHER THAN BY A PRIVATE PARTY

We have heretofore emphasized that in *United States Navigation*, this Court refused to accept the dictum of the Circuit Court of Appeals to the effect that the Government could have maintained the suit even though a private party could not. In thus declining to follow the Circuit Court of Appeals, this Court was impliedly taking account of its own previous decisions which indicate that the Circuit Court of Appeals had misconceived the law.

The earlier authorities were *United States* v. *Pacific & Arctic Railway & Navigation Co.*, 228 U. S. 87; *United States* v. *St. Louis Terminal*, 224 U. S. 383 and 236 U. S. 194; and *Terminal Railroad Assn. of St. Louis* v. *United States*, 226 U. S. 17. These cases are fully discussed in the brief filed herein by the Far East Conference, and we refer to that discussion in the interest of brevity. It is sufficient to note here that the cases cited show a consistent refusal on the part of this Court, over a period of years antedating *United States Navigation*, to allow the Attorney General to apply the antitrust laws and the criminal provisions of the Interstate Commerce Act in a manner that would have collided with the administrative powers of the Interstate Commerce Commission. Similarly, the same decisions would have stood in the Attorney General's way had he, rather than the United States Navigation Company, filed the complaint which this Court held subject to dismissal in *United States Navigation*.

(C) THE APPLICABILITY OF THE *UNITED STATES NAVIGATION* DOCTRINE TO A SUIT BY THE ATTORNEY GENERAL HAS NOT BEEN AFFECTED BY SUBSEQUENT DECISION OF THIS COURT

The Attorney General contended below that *United States Alkali Export Assn.* v. *United States*, 325 U. S. 196, and *United States* v. *Borden Co.*, 308 U. S. 188, have rendered the rule as to primary administrative jurisdiction inapplicable

to the Attorney General as enforcer of the anti-trust laws. This contention is not supportable.

United States Alkali was a suit by the Government under section 4 of the Sherman Act to restrain violations of that Act by two export associations organized under the Webb-Pomerene Act (15 U. S. C. 61), the domestic members of those associations, a British corporation, and its American subsidiary. The defendants moved for dismissal of the complaint on the ground that its allegations involved matters within the exclusive preliminary jurisdiction of the Federal Trade Commission. The District Court denied the motion and was affirmed by this Court. The affirmance was *not* based upon the ground that the rule of primary exclusive jurisdiction was inapplicable to the Government. Indeed, the opinion contains no suggestion that any such rule exists. Rather, the Court rested its decision upon the following grounds:

(1) The Federal Trade Commission lacked authority to restrain the alleged violations, since it had power only to investigate suspected violations and refer its findings to the Attorney General—in contrast with which the Maritime Board has power to afford a complete remedy under sections 14a and 22 of the Shipping Act (46 U. S. C. 813, 821).

(2) The actions set forth in the *Alkali* complaint were not violations of the Webb-Pomerene

Act, which the Trade Commission administered, but only of the Sherman Act, which the Attorney General had a statutory duty to enforce. In contrast, the present complaint does pertain to matters which fall directly within the purview of the Shipping Act, which the Maritime Board has full power to enforce.

(3) Exclusive jurisdiction in *Alkali* could be lodged in the Trade Commission only if the Webb-Pomerene Act repealed the Sherman Act by implication—which this Court held it did not do. But here, the Shipping Act in section 15 confers an *express* exemption from the antitrust laws, and *United States Navigation* holds that in such circumstances as those here involved, it supersedes those laws.

United States v. *Borden Co., supra,* involved an indictment under the Sherman Act of several groups of defendants engaged in the production and distribution of milk. The District Court granted a motion to dismiss the indictments on the ground that under the Capper-Volstead Act (7 U. S. C. §§ 291, 292) and the Agricultural Marketing Agreement Act (50 Stat. 246), the acts charged against the defendants were within the exclusive jurisdiction of the Secretary of Agriculture, and were exempt from the Sherman Act. This Court reversed the order of dismissal.

Of the contention that the Agricultural Marketing Agreement Act had superseded the Sherman

Act, this Court said (308 U. S. at 198): "No provision of that purport appears in the Agricultural Act." The Court noted that the Act merely authorized certain milk marketing agreements between producers of milk and the Secretary of Agriculture, and provided that the making of such agreements should not be held to violate the antitrust laws. The Court held that since the Secretary had not been a party to the agreement on which the indictment was founded, the defendants were not within the scope of the granted immunity. Differently stated, the ruling was that the defendants had made themselves parties to an agreement which was not the type of agreement that the statute exempted.

As to the exemption claimed under the Capper-Volstead Act, the Court held that it applied only to *producers* of agricultural products, authorizing certain cooperative action on their part. It said (308 U. S. at p. 204):

> In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officals, and others, in order to maintain artificial and noncompetitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus in effect, as the indictment is con-

strued by the court below, "to compel independent distributors to exact a like price from their customers" and also to control "the supply of fluid milk permitted to be brought to Chicago." 28 F. Supp. 180–182. Such a combined attempt of all the dendants, producers, distributors, and their allies, to control the market finds no justification in Section one of the Capper–Volstead Act.

The present suit does not charge a conspiracy among any persons other than those covered by the exemption in section 15 of the Shipping Act. In this respect it differs markedly from *Borden*, where the conspiracy included groups of conspirators not protected by any antitrust exemption. The present complaint involves no charge of conspiracy between carriers *and shippers*, but only a conspiracy among carriers. Since it appears from the complaint that the acts of the defendants were performed under an approved steamship conference agreement (R., 5) and since such agreements are specifically excepted from the antitrust laws, it seems clear that the complaint fails to state a cause of action under those laws. See *Central Transfer Co.* v. *Terminal R. R. Co.*, 288 U. S. 469, 476.

Borden and *Alkali* both omit any reference to or announcement of a general rule that prior resort to its own administrative agencies is not demanded of the Government—the reason being that no such rule exists.

The Government's case is not helped by *Georgia* v. *Pennsylvania R. R. Co.*, 324 U. S. 439, in which this Court upheld the right of Georgia to file a complaint charging a conspiracy among defendant railroads to establish a rate structure discriminatory against the State and its inhabitants. The Court held that a proceeding before the Interstate Commerce Commission was not a prerequisite to the filing of a complaint in this Court, since the Interstate Commerce Act does not "'legalize a rate-fixing combination of the character alleged to exist here" (324 U. S. at p. 457). It said: (324 U. S. at p. 456)

> * * * But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the antitrust laws. It has not placed these combinations under the control and supervision of the Commission * * *.

The quoted language clearly indicates the difference between the *Georgia* case and the present action, since under the Interstate Commerce Act, Congress had not, prior to enactment of the Reed-Bulwinkle Act (49 U. S. C. 5b), given the Interstate Commerce Commission authority to exempt rate-fixing combinations from the antitrust laws, whereas under the Shipping Act, Congress has expressly conferred such authority upon the Maritime Board. This distinction is funda-

mental. It seems obvious that *Georgia* would have been differently decided had the Reed-Bulwinkle Act applied to the matters there involved.[7]

(D) THE DISTRICT COURT WAS IN ERROR IN HOLDING THAT THE GOVERNMENT WAS WITHOUT A REMEDY UNDER SECTION 22 OF THE SHIPPING ACT

Resort to an administrative agency will not be compelled when no administrative remedy is available. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246; *McClellan* v. *Montana-Dakota Utilities Co.* (D. C. Minn., 1951), 95 F. Supp. 977, 979. The Court below therefore held that the United States could not be forced to pursue an administrative remedy under the Shipping Act, for the reason that no such remedy was open to it. The Court reached this conclusion by interpreting Section 22, which confers the right to file a complaint before the Board upon "any person" injured by a violation of the Act, as conferring no such right upon

[7] Compare *Keogh* v. *Chicago and N. W. R. Co.*, 260 U. S. 156 (1932) in which this Court held that an action could not be maintained by a shipper under the Sherman Act to recover damages resulting from exaction of unreasonable rates fixed by a conspiracy of the defendant railroads and embodied in tariffs filed with and approved by the Interstate Commerce Commission. That Commission was held to have exclusive power to determine what rates were reasonable; and the Court held that to allow recovery by an individual shipper might disturb the pattern of uniformity that the Interstate Commerce Commission was obligated to enforce in transportation matters.

the United States because the sovereign is not a person. The Court's conclusion is unsound.

While the United States has for some purposes been declared not to be a person, there is no general rule which declares that it is not or cannot be a person. See *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 92–94; *Stanley* v. *Schwalby*, 147 U. S. 508, 517. Compare *California* v. *United States*, 320 U. S. 577, 585.

In *United States* v. *Interstate Commerce Commission*, 337 U. S. 426 (affirming 78 F. Supp. 580) the Government was recognized as a "person" entitled to maintain a complaint proceeding before the Interstate Commerce Commission under section 9 of the Interstate Commerce Act (49 U. S. C. 9) which is patterned closely upon section 22 of the Shipping Act. *United States Navigation Co.* v. *Cunard*, *supra*, 284 U. S. at page 481. Further, the Government's status as a person, even under the antitrust laws, is implied by section 16 of the Clayton Act (15 U. S. C. 26) authorizing injunctive relief but providing that "nothing contained in sections 12, 13, 14–21, 22–27 of this title shall be construed to entitle any *person*, firm, corporation, or association, *except the United States*," to sue in equity for such relief against common carriers regulated by the Interstate Commerce Commission.

The Maritime Board has on several occasions authorized intervention by the Attorney General in proceedings before the Board dealing with the dual-rate system. *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11; *Isbrandtsen Co.* v. *North Atlantic Continental Freight Conference*, 3 F. M. B. 235. This circumstance was noted, but deemed immaterial, by the District Court. The Board's Rules of Practice (46 C. F. R., sec. 201.81) refer to interveners as "persons." Thus, the Government has been administratively recognized as a person under the Shipping Act; and the administrative practice is entitled to respect in determining whether the Government is within the scope of a statute. *United States* v. *Cooper Corp.*, 312 U. S. 600, 605.

The District Court, we believe, pursued an unsound judicial policy in denying the Government's status as a person entitled to avail itself of the remedies of the Shipping Act. Its ruling on this point was unnecessary to its decision and might adversely affect the Government in future cases. For example, if the United States is not a person under section 22 of the Shipping Act, it can not, as a shipper, seek reparation from maritime carriers subject to the Board's jurisdiction—although it can seek such reparation before the Interstate Commerce Commission against carriers regulated by that agency. (*United States* v. *Interstate Commerce Commission*,

supra.) Further, it would appear shortsighted to deny to the Government for all time the right to appear before the Maritime Board in its sovereign, as distinguished from its proprietary, capacity, solely to bolster the Attorney General's position in *this* case.

But whether the Government *in the person of the Attorney General* has an unqualified legal right to file a complaint is of secondary importance. Section 22 of the Shipping Act authorizes proceedings by the Board on its own motion, and the Board hears the Attorney General when he asks to be heard. Its proceedings would be valid even if initiated on a complaint that the complainant had no standing to file. *United States* v. *N. Y. Central R. R.*, 272 U. S. 457, 462; *Isthmian S. S. Co.* v. *United States* (S. D. N. Y.), 53 F. 2d 251, 253. Since the Board could and would hear the Attorney General if asked to do so, his preliminary resort to the agency, under the *United States Navigation* doctrine, should not be waived.

While we think it clear that the Attorney General has, both legally and practically, an administrative remedy before the Board, we submit that the present suit would not be maintainable even if he had no such remedy—since the non-availability of a remedy *to the Attorney General* is in no sense synonymous with the non-availability of a remedy to the United States. The Maritime Board represents the United States and *is* the United States for the purposes of maritime regulation under the

Shipping Act, to precisely the same extent as the Attorney General represents the United States when acting with respect to matters committed to his jurisdiction. Since the decision in *United States Navigation,* it is undeniable that with respect to such matters as are here involved, the Government acts primarily through the Board and only secondarily through the Attorney General.[8] Thus, even if the Attorney General has no right to institute Board proceedings, the Board has such a right and the right of the Board is the right of the United States.

(E) THE CONFERENCE AGREEMENT OF THE F . EAST CONFERENC. AUTHORIZES THE USE OF THE DUAL-RATE SYSTEM

The Attorney General argued in the District Court that the Far East Conference Agreement did not provide for the dual rate, exclusive patronage system, and that consequently the Board's order approving that agreement could not immunize the Conference, in its use of such system, from the antitrust laws. While this argument seems irrelevant in the light of *United States Navigation,* where the Board was held to have exclusive jurisdiction even though the conference agreement had not been approved (see 50 F. 2d at

[8] The only duties of the Attorney General under the Shipping Act are those conferred by section 29 (46 U. S. C. 828) which provides that the Attorney General, among others, may apply to a District Court for the enforcement of the Board's orders, other than orders for the payment of money. Even under this provision, the Attorney General has no power to act until after the Board has acted.

p. 85), we nevertheless deem it appropriate to indicate that here, the dual-rate system has in fact been approved.

It is true that the conference agreement of the Far East Conference does not *explicitly* authorize the use of the dual-rate system. It does, however, authorize such rates by necessary inference, and by virtue of the interpretation given to the agreement by the Board and its predecessors over a long period of time.

The conference agreement provides, among other matters, that the conference members may "establish tariffs of freight rates * * *" (R. 11). It does not specify *what* rates or what *kind* of rates (e. g., low or high, single or dual, contract or noncontract) these rates shall be. If it be true (as it is) that the agreement is not expressly permissive of contract and noncontract rates, it is equally true that neither is it expressly permissive of any other type of rates. It seems evident that the type of rate structure to be evolved under the conference agreement was deemed by the parties and the Board to be a matter necessarily subject to development under the Board's supervision, in the exercise of the comprehensive powers conferred upon the Board by the Shipping Act. Any other interpretation would frustrate the Board's powers, and transform the exemption from the antitrust laws into an illusory and perilous "benefit" to the shipping industry—since *any* rate would become a criminal

rate under the Sherman Act unless specifically approved as a part of the conference agreement.[9] There is no suggestion in the Shipping Act or its legislative history that Congress meant, by the legalization of steamship conferences, to establish any such system of entrapment.

The Board and its predecessors have interpreted the Far East Conference agreement as authorizing the type of rate structure employed by the present defendants. For example, the Shipping Board Bureau in its Docket No. 128, *Section 19 Investigation* (1935) 1 U. S. S. B. 470, specifically referred to the Far East Conference agreement in the following terms (p. 480):

> It will be noted that in Tables II and III the rates of the Conference are headed "contract" rates. Prior to the collapse of the Far East Conference in 1931 it has been the practice of the Conference to give on some commodities reduced or "contract" rates to all shippers, large or small, who agreed to give all their business for a period of one year to the Conference carriers. Effective September 1, 1932, as a result of the combined competition of Isbrandtsen-Moller and Ellerman & Bucknall, the Conference revived this contract

[9] In no field of transportation known to us is a carrier required to obtain advance approval of its rates. Any requirement of that type would obviously impose a regulatory burden upon public agencies that could not conceivably be discharged. See *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 259.

rate system and extended it to practically all commodities. This move by the Conference was countered by substantial additional cuts in rates by Ellerman & Bucknall as indicated in Table II.

Further, the Board and its predecessors, as may be inferred from the complaint (R., 5), have permitted tariffs of dual rates, containing exclusive patronage provisions, to be filed for public information over a period of many years. It cannot be assumed that the filing of such tariffs could have been allowed over a long period of time unless the agency had interpreted the conference agreement as authorizing the tariffs in question. The Board and its predecessors are best qualified to know the scope of their own orders giving approval to the conference agreement, and their interpretation of such orders is entitled to judicial respect. *United States* v. *Eaton,* 169 U. S. 331, 343; *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232, 242; *National Labor Relations Board* v. *Virginia Electric Power Co.,* 314 U. S. 469, 479; *Byers Transportation Co.* v. *United States,* (D. C., W. D. Mo.) 48 F. Supp. 550, 553.

The Board approved the Far East Conference Agreement in 1922 (R., 5). As above noted, it knew, officially and actually, that the conference was employing a dual-rate schedule and offering lower rates to shippers signing exclusive patronage contracts. If the Board had interpreted its

order approving the basic conference agreement as *not* authorizing the dual-rate system, it would presumably have entered a further order either enjoining the use of the system, or requiring that the conference agreement be modified under authority of section 15 of the Shipping Act. Since it pursued neither of these alternatives, its conduct emphasizes the Board's understanding that it had authorized the system which the Attorney General here attacks, and this Court should accept the Board's interpretation. As stated in *United States* v. *Eaton, supra* (169 U. S. at 343):

> The interpretation given to the regulations by the department charged with their execution, and by the official who has the power, with the sanction of the President, to amend them, is entitled to the greatest weight, and we see no reason in this case to doubt its correctness.

In *Bowles* v. *Seminole Rock and Sand Co.*, 325 U. S. 410, 413, this Court said, relative to a regulation of the Price Administrator:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the

> ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

If the Board's order approving the conference agreement does not in fact authorize the exclusive patronage system, it can readily be made to do so by the process of amendment. In these circumstances, it would be no more than an "idle gesture" for a court to enter a decree prohibiting what the Board "might later approve or condone" by amending its own order. *Georgia* v. *Pennsylvania R. R. Co., supra,* 324 U. S. at 461.

Point II

THE BOARD HAS POWER UNDER SECTION 14 THIRD AND SECTION 15 OF THE SHIPPING ACT TO APPROVE CONFERENCE AGREEMENTS PROVIDING FOR THE DUAL-RATE SYSTEM

In the court below, the Attorney General contended that even if the Board's order approving the conference agreement should be construed as authorizing the dual-rate system, such approval should nevertheless be disregarded for the reason that the Board lacked statutory power to approve the system. (A similar contention was brushed aside in *United States Navigation,* 284 U. S. at 487.) It may be conceded that no purpose would be served by referring the present controversy to the Board if the Board lacked power to permit the acts with which the conference lines are charged. *Skinner & Eddy Corp.* v. *United States,*

249 U. S. 557, 562; *Pennsylvania R. R. Co.*, v. *International Coal Mining Co.*, 230 U. S. 184, 197; *Lichten* v. *Eastern Air Lines* (2d Cir., 1951) 189 F. 2d 939, 946 (dissenting opinion).

We agree with Judge Frank's statements in *Civil Aeronautics Board* v. *Modern Air Transport* (2d Cir.) 179 F. 2d 622, 625, that to refer a matter to an agency for possible approval of what the law forbids, would be merely a "delaying formalism" that would serve none of the purposes which the doctrine of primary administrative jurisdiction is intended to promote—one of such purposes being to let the courts "make a workable allocation of business between themselves and the agencies." (179 F. 2d at 625.)

Our insistence that the subject of the present suit be referred to the Board before adjudication in court is in no sense based upon the expedient of "delaying formalism," but upon the necessity of protecting the Board's primary jurisdiction as conferred by Congress, to regulate the activities of steamship conferences through the device, among others, of granting or denying them immunity from the normal rules of competitive behavior. Assertion of the Board's primary jurisdiction necessarily rests on the proposition that the Board has power to authorize what the Court is here asked to prohibit.

The Board's power to approve the dual-rate system stems from section 15 of the Shipping Act and involves the question whether the power conferred by section 15 is circumscribed by restrictions set forth in section 14, paragraph Third, of the same statute.

The Board's power to authorize the use of dual rates is the principal question presented in *Federal Maritime Board* v. *United States of America, et al.*, No. 135 on this Court's current docket, and in its companion appeal, *A/S J. Ludwig Mowinckels Rederi, et al.* v. *Isbrandtsen Co., Inc.*, No. 134 on the current docket. The Maritime Board in No. 135 has briefed in detail the arguments in support of its authority to approve the dual-rate system. We refer to the Board's brief in that case in support of its contention here that approval of the dual-rate system for use by conferences in the foreign commerce of the United States is within the Board's statutory authority.

CONCLUSION

This case aptly illustrates the need "to make a workable allocation of business" between the District Court, on the one hand, and the Board, on the other, in relation to their respective duties under the interacting provisions of the antitrust laws and the Shipping Act. It calls for application of the rule of *United States* v. *Morgan*, 313 U. S. 409, 422, that courts and administrative agencies "are to be deemed collaborative instrumentalities of justice and the appropriate inde-

pendence of each should be respected by the other." The court should recognize here, as it recognized at an earlier stage of the *Morgan* litigation (307 U. S. 183, 191), that—

> * * * court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim.[10]

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[10] See also *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, *supra*, 341 U. S. at 263–264 (dissenting opinion). And compare *West India Fruit & S. S. Co.* v. *Seatrain Lines, Inc.*, (2d Cir., 1948), 170 F. 2d 775, petition for certiorari dismissed, 336 U. S. 908, where the Court, in aid of the Maritime Commission's jurisdiction, issued an injunction which the Commission could not have issued, so that the Commission, in the exercise of its primary jurisdiction, could inquire into the lawfulness of a threatened rate war in foreign trade.

The present suit, like many other cases involving collaborative action among the members of a regulated industry, emphasizes the potential conflict between the antitrust laws and a regulatory statute, and presents a challenge to devise a formula for the avoidance of such conflict. The facts set forth in the complaint relate to activities which might be violations of the antitrust laws, but which also are squarely within the purview of the Shipping Act. The antitrust laws embody an economic policy looking toward the maintenance of unrestricted competition as the basic *general* rule for the conduct of the nation's business. The Shipping Act points in a different direction, and prescribes for the shipping industry, by way of specific and purposeful exception to the general policy of the antitrust laws, a system of controlled competition which, but for the Shipping Act, we may assume the antitrust laws would prohibit. We assume that the Attorney General, in his administrative capacity as the Government's chief legal officer, is bound to take account of the Shipping Act as ungrudgingly as he enforces the Sherman Act. The rule of *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31, 47, where this court said:

> * * * It is sufficient for this case to observe that the Board has not been com-

> missioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

is justly applicable to the Attorney General in the present suit.

Congress could not have meant that the shipping industry should be the victim of competition between government agencies or officers respectively charged with the administration of statutes which subject persons affected by them to inconsistent legislative standards. It seems clear that this was the consideration that controlled the reasoning of the court in *United States Navigation,* and which prompted the Court in that decision to establish the regulatory pattern that recognized the Shipping Act rather than the antitrust laws as the first commandment for maritime carriers in foreign trade.

We submit that every consideration of regulatory and economic policy which prompted this Court to apply the rule of exclusive primary jurisdiction in favor of the Board in *United*

States Navigation, should impel the Court to apply it similarly here. In so doing, the Court would give recognition to the fact that the courts and the Maritime Board are "collaborative instrumentalities of justice," and would enable each to function effectively in its own province.

Dismissal of the present complaint would not mean that the shipping industry was fully discharged from the restraints of the antitrust laws. It would mean that the Board, with the cooperation of the Attorney General if he chooses to lend it, could discharge its officially delegated powers in the manner intended by Congress; and it would preserve to the courts their power to assure the Board's compliance with law through the exercise of their powers to review the Board's action (Shipping Act, section 31, 46 U. S. C. 830). The Board's position would have no tendency whatever to nullify the jurisdiction of the courts, since the Board does not contend that it has power to speak the last word, but only the first, with respect to the legality of the acts charged against the defendants by the present complaint.

WE REQUEST THAT THE ORDER OF THE DISTRICT COURT, INSOFAR AS IT DENIED THE MOTIONS TO DISMISS THE COMPLAINT, BE REVERSED; OR IN THE ALTERNATIVE, THAT THE CASE BE REMANDED TO THE DISTRICT COURT WITH DIRECTIONS TO STAY FURTHER PROCEEDINGS PENDING REFERENCE OF THE COMPLAINT TO THE BOARD.

Respectfully submitted.

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APPENDIX A

SHERMAN ACT

SECTION 1. (15 U. S. C. 1, 26 Stat. 209). Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

SEC. 2. (15 U. S. C. 2, 26 Stat. 209). Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. (15 U. S. C. 4, 26 Stat. 209, 36 Stat. 1167). The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1–7 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall pro-

ceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SHIPPING ACT

SEC. 14. (46 U. S. C. 812, 39 Stat. 733). That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay, or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purposes of excluding, preventing, or reduc-

ing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provisions of this section shall be guilty of a misdemeanor punishable by a fine of no more than $25,000 for each offense.

SEC. 15. (46 U. S. C. 814, 29 Stat. 733). That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations,

or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in

part, directly or indirectly, and such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

SEC. 22 (46 U. S. C. 821, 49 Stat. 736). That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two

years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.

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